No. 15,395

In the

United States Court of Appeals

For the Ninth Circuit

MILTON E. DAM and EVERETT S. DAM, Co-partners doing business under the Firm Name and Style of DAM BROTHERS,
Appellants,

vs.

GENERAL ELECTRIC COMPANY, a corporation,
Appellee.

Brief for Appellee

Appeal from the United States District Court for the Eastern District of Washington, Northern Division

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STATUTES AND RULES

TEXTS

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I.

STATEMENT OF THE CASE

A. Nature of the Action.

This action was commenced in the District Court in 1952 and is based upon an alleged oral contract made in 1913 between plaintiffs-appellants and defendant-appellee General Electric Company.* The first cause of action is for

*Plaintiffs-appellants and defendant-appellee are hereinafter designated as plaintiffs and defendant, respectively.

damages for breach of such oral contract. The second cause of action (in the alternative) is a claim for the unjust enrichment of defendant resulting from the alleged performance by plaintiffs under such oral contract.

B. The Ruling of the District Court.

The District Court granted defendant's motion for summary judgment on the grounds that both causes of action were barred (a) by the three-year statute of limitations as applied in the State of Washington and (b) by the doctrine of laches as it has been applied in the State of Washington. Summary judgment thereafter was entered. This appeal was taken by plaintiffs from such judgment.

C. The Issue Before This Court.

The issue before the Court is whether the District Court could properly grant defendant's motion for summary judgment where:

1. The oral contract allegedly made with defendant in 1913 was admitted[1] for the purpose of the motion and not otherwise.

2. Defendant, in support of its motion, presented evidence which of itself established that (a) defendant to the knowledge of plaintiffs never performed such oral contract and, many years before the commencement of the action, made clear by its acts and conduct that its part of such contract would not be performed, and (b) all individuals who acted for defendant in making such alleged oral contract had died eight years or more before the commencement of the action.

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1. It is and has been defendant's position (except for the purposes of the motion for summary judgment) that General Electric Company was never a party to any such oral contract.

3. Plaintiffs, in opposition to the motion, (a) did not specify any evidence which could be adduced to change the result of such material facts but (b) relied solely upon general allegations in an amended complaint of assurances of performance by defendant and reliance thereon by plaintiffs.

4. The record contains no basis for concluding that any evidence could be adduced to change the result of such material facts.

II.

PROCEEDINGS IN THE DISTRICT COURT

A. Introduction.

In passing upon defendant's motion for summary judgment the District Court, as required by Rule 56, considered "all the relevant material" in the file of the case (R. 237) to determine whether there was a genuine issue as to any fact material to the defenses of limitations and laches. For this reason, and so that this Court may have the same perspective as the District Court, the full record on appeal is hereinafter summarized.

B. Summary of Proceedings.

The proceedings are summarized chronologically as listed below. The numbers opposite each item refer to pages of this brief.

1. ORIGINAL COMPLAINT.

The action was commenced on July 16, 1952, by the filing of a verified[2] complaint containing eighty-seven numbered paragraphs of detailed allegations (R. 3 to 44). Named as defendants were General Electric Company, a New York corporation, Electric Bond and Share Company, a New York corporation, and American Power & Light Company, a Maine corporation. Electric Bond and Share Company was alleged to have been wholly owned by General Electric Company until "soon after 1925" when General Electric Company distributed among its stockholders the Electric Bond and Share common stock (R. 8). American Power & Light Company, in turn, was alleged to have been organized by Electric Bond and Share Company and "until November 1935" wholly under Electric Bond and Share Company's domination (R. 9).

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2. Under Rule 56(e), the Court could properly consider the verified complaint along with the affidavits of plaintiffs in determining whether allegations in the unverified amended complaints were intended to tender genuine issues of fact or were formal only.

Pleadings in the Federal Court need not be verified, of course, under Rule 11.

American Power & Light Company was also described as the owner of "all the common stock of its dummy holding company the Washington Irrigation & Development Company, a Washington Company" (R. 4).

A summary[3] of the verified complaint follows:

Plaintiff, "during the **1890's**" became interested in irrigation and land development on the Columbia River at Priest Rapids. By **1913** they had acquired control of a large acreage of irrigable land; organized a Priest Rapids Land Owners' Association; accomplished favorable changes in Washington laws; obtained appropriations for geological work; undertaken and paid for engineering and other investigations; worked out a transportation and communications system; interested persons who were ready to colonize the lands and contractors who were ready to accept Priest Rapids Highland Irrigation District bonds for construction of a proposed project; and acquired full confidence and the moral support of land owners and government authorities (R. 5 to 7).

About **1910** the "General Electric Company's subholding and subsidiaries" made their first investments at Priest Rapids (R. 10).

During this period, Mr. Sidney Z. Mitchell, president of **Electric Bond and Share Company,** "100% owned by the General Electric Company" (R. 12), became concerned about the Dam Brothers and their Priest Rapids interests for these reasons: the Dam Brothers' plans did not require

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3. It is difficult to summarize this pleading, not only because of its great length and failure to follow a chronological development, but also because of the uncertain and vague allegations regarding the relationship of the defendants to each other and to the plaintiffs. For these reasons, as well as for emphasis, many allegations or portions thereof are quoted verbatim.

Heavy black type, whether or not in quoted material, means that the emphasis is ours.

Federal approval; the Dam Brothers' plan would interfere with the plans of "General Electric-Electric Bond and Share" to develop a single high dam; "General Electric-Electric Bond and Share" had only partial power site lands; and, the "'power people'" could not obtain a change in objectionable water power laws (R. 12-13).

"Mr. Mitchell" consequently made overtures to the Dam Brothers which resulted in their accepting his invitation to go to New York for consultation, and in **April, 1913,** "a joint adventure was formed with **Electric Bond and Share Company** at their offices * * * for the development of a greater Priest Rapids project" (R. 13).

As their part of the "joint venture agreement" the Dam Brothers agreed to do the following:

Abandon their plans and join with the "General Electric-Electric Bond substitute plans" for development of the rapids; make available the results of their previous investigations; help obtain additional power site and industrial lands to be turned over to "the **Electric Bond and Share Company,** which would build the dam. **With a Priest Rapids Power Company organized and incorporated by them when the federal legislation for a power bill was passed**"; acquire jointly with **"Electric Bond & Share Company"** about 55,000 acres which were a part of the Dam Brothers' original Priest Rapids project plans, and "help obtain passage of a Federal Water Power Bill in Congress to permit **Electric Bond & Share** to build a dam at Priest Rapids * * *" (R. 14, 15).

The "commitments of the General Electric-Electric Bond & Share interests" included the following:

Dam Brothers were to receive $500,000 of the common stock of the **Priest Rapids Power Company** which would be incorporated "**when the water power bill passed Congress**"; to own a "large percentage" of the land holding syndicate to

be formed at once, "with the syndicate to be limited to and comprise the Dam Brothers, the **Electric Bond & Share Company,** with a few of their officials who would help in the Priest Rapids work"; to have a ten per cent interest in the "**Townsite-Terminal Company,** to include industrial, business, residential and terminal property company operations. **The operating companies to be incorporated when the power company was formed**"; to receive the same division of ten per cent interest in various other syndicates and companies to be organized; "Defendants" would furnish the funds for the various activities and expenses, and "**with the passage by the United States Congress of the Water Power Bill, the Electric Bond & Share Company would at once start all the activities at Priest Rapids**" (R. 16, 17).

At this time, "Mr. Mitchell represented that the great General Electric Company was the largest electrical equipment manufacturing concern in the world; that they owned Electric Bond & Share Company, and **were behind its development plans.** That Mr. Charles A. Coffin, then chairman of the Board of Directors of General Electric, was anxious to see Priest Rapids developed, which was later confirmed by the then president of said corporation" (R. 16.)

During these New York conferences, "**in April 1913**" a land syndicate was formed, with the understanding that when this ownership of the land had served its purpose and "upon passage of the bill" **Electric Bond & Share** interests would release their unit control position of the land syndicate giving full management of the lands to the Dam Brothers (R. 20). The actual purchase of the land was then carried out by the syndicate "immediately following the conclusion of the **April, 1913,** conference and formation of the joint adventure agreement **between Electric**

Bond & Share and Dam Brothers * * *" (R. 20). A portion of these lands, at the suggestion of the Dam Brothers, was transferred from the syndicate to the Washington Irrigation & Development Company and "have since then been held and are still a part of the assets of the said power site holding company * * *. And constitute one of the claims by the partners, Dam Brothers, against the said defendants as part of the **April, 1913**, partnership agreement" (R. 21-22).

In 1916 the Columbia Highlands Company was incorporated "and the syndicate transferred title of the **entire** land holdings to the new land holding corporation-syndicate." The capital stock of the corporation was distributed to the parties in proportion to their respective interests in the land syndicate (R. 28).

Plaintiffs also "invited attention to **Electric Bond & Share**" to the existence of a mineral "'Tufa'", a form of natural cement near the head of Priest Rapids available for construction without transportation costs (R. 22). This deposit of Tufa was held by "the Washington Irrigation & Development Company continually up to about the year 1949" (R. 37, 38). It was to have been transferred to a Tufa Natural Cement Company development organization **"when the water power bill was passed** and the power company formed to build the dam at Priest Rapids" (R. 22).

During the New York visits by plaintiffs, the president of American Power & Light Company and Mr. Edwin W. Rice, president of General Electric Company, both **"expressed interest"** in the Tufa (R. 22, 23).

Immediately after **April 1913** plaintiffs started on the agreed work to help secure federal legislation for a dam at Priest Rapids. A delay of seven years occurred in securing this legislation, and this delay was "caused by General Electric-Electric Bond & Share changing the agreed plans

for a water power bill which could have been passed in Congress within two sessions, without the knowledge or consent of Dam Brothers **and constituted a breach of their agreement with plaintiffs,** * * *" (R. 24).

With the passage of the water power bill in **"March 1920"** and the formation of the Federal Power Commission, an application was filed for the permit for the dam "by the General Electric-Electric Bond & Share interests in the name of the said Washington Irrigation & Development Company" (R. 26).

At this time, **"during 1920 and 1921,"** the **"partners of Dam Brothers** commited acts of conspiracy, conniving and misrepresentation, by undertaking secretly to dispose of the entire land holdings of approximately 50,000 Acres owned by the General Electric-Electric Bond Share interests-Dam Brothers land holding syndicate-company, without the knowledge, counsel or consideration of their partner-associates Dam Brothers. In complete violation of the 1913 Joint Adventure Agreement, **thus constituting a major breach of contract."** This "secret land sale was blocked by the Dam Brothers and the said transaction was then dropped by the Defendants" (R. 26, 27).

On **March 3, 1921,** the permit was issued and "the power holding company" undertook the diamond drilling of the dam foundations and **"Electric Bond & Share Company** proceeded to complete the engineering work and plans in its own engineering offices * * * so that a contract could be awarded for the construction of the said dam" (R. 29). **In June 1922** "Mr. Mitchell recommitted the General Electric-Electric Bond and Share commitments, and others added due to Defendants' desire for new and added help from Dam Brothers" (R. 30). The Dam Brothers because of the **"recent land sale conspiracy by Defendants"** believed that they

"should acquire the syndicate land holdings in order to protect the irrigation project as well as their interests at Priest Rapids" (R. 30). A cash down payment of a considerable sum was made to Mr. Mitchell personally on a Land Purchase Agreement after **"the positive assurance of Mr. Mitchell that General Electric-Electric Bond were ready to get started right away for letting the construction contract for the dam at Priest Rapids"** (R. 30, 31). Nominal payments were made by Dam Brothers to defendants to cover county taxes and corporate expenses of the syndicate company between **1923** and **1926** (R. 34).

The **license** for the dam was issued on **March 25, 1925.**

At all times "the Dam Brothers fulfilled every pledge, duty and obligation that they were committed to by the Joint Venture agreement with General Electric-Electric Bond and Share." The "General Electric-Electric Bond and Share," however, **"failed to fulfill any of their commitments to Dam Brothers during the periods mentioned in the complaint,** covered by the Joint Adventure agreement made **April, 1913,** and additional commitments made by the Defendants following the first agreement with Plaintiffs" (R. 39).

It was clear also from the prayer that followed that the "defendants" had never carried out **"any** of their commitments to Dam Brothers."

The **verified** complaint did **not** allege **any facts** occurring in the **twenty-seven year period** from March, 1925, when the license for the dam was issued, to the commencement of the action, which would make inapplicable accepted rules on accrual of causes of action, limitations and laches.

These twenty-seven years of prosperity, depression, war and peace were covered by these allegations:

LXX.

"That the country was in the middle of a ten year electrical boom and industrial prosperity, with the demand for large blocks of hydro-electric power resulting in new power construction and installation all over the United States." (R. 34)

LXXI.

"That everything envisioned by Mr. Charles A. Coffin, head of the great General Electric Company, as pictured to Dam Brothers during the April, 1913, New York conferences, about hydro-electric development, new and wonderful uses for electricity, the enormous prospective demand for electrical equipment and products manufactured by General Electric Company, if favorable water power legislation could be secured, all came to pass. And more too, in the way of electro-metallurgical and electro-chemical demands for hydro-electric power and anxious to go to Priest Rapids. **Yet, the world's leading electrical interests failed to start construction of the dam at Priest Rapids upon receiving the License from the Government.**" (R. 34-35)

LXXII.

"**That defendants could have easily financed and constructed said dam,** as there were large power users and customers anxious for large blocks of industrial power far exceeding the full possible capacity of the Priest Rapids dam. The worth of the Electric Bond & Share [24] Company, wholly owned by the General Electric Company, increased and mounted from the passage of the Water Power Bill, March, 1920, with the forming and buying of utility companies, domestic and foreign, investments by the Hundreds of Millions of Dollars, as a direct result of the improved water power laws. The origin, the starting in 1913, and need for same based almost entirely upon the plans and work of Dam Brothers; the main purpose of the Joint Adventure formed

by them and General Electric-Electric Bond, the successful enactment of the bill which received the valuable and loyal contributions of the Plaintiffs. (R. 35)

LXXIII

"That the last five years of this most prosperous period in the history of the United States, for privately owned utilities, termed the 'Electrical Era,' **was permitted to pass by** the **Electric Bond and Share Company** by bungling and mismanaged what limited attention they gave the Priest Rapids plans, **wasted and dissipated this wonderful opportunity** to develop this most favorable water power site, in which the General Electric-Electric Bond had then upwards of $10,000,000.00 invested." (R. 36)

LXXV

"That because of the depression following the 10 year Electrical Boom and prosperity, the government policy of building large hydroelectric dams, and the World War II years with restriction in the use of Capital, Materials and Labor, development by private utilities was not considered favorable. **There was continued hopefulness** for the conditions to change and construction of dams by the private power companies throughout the United States." (R. 36)

LXXVI

"A Major Priest Rapids Asset Ruined"

"That following cessation of hostilities of World War II the Defendants entered into negotiations in fraud of the rights of Dam Brothers therein by selling the total land holdings of the Syndicate-Company on the Priest Rapids Highlands for a nominal sum, and Forever placed said partnership syndicate lands out of the power of the Defendants and Dam Brothers for development and sale. That at all times Dam Brothers served written and verbal notice of their objections to

any disposition of the said Syndicate lands, either in whole or in part." (R. 37)

LXXVII

"That in protesting the said proposed sale of the lands, Dam Brothers sent registered mail notices to the defendant companies, General Electric-Electric Bond and Share, and the Columbia Highlands Company, to serve warning of the Defendants' responsibility and their obligations to Dam Brothers for their vast and substantial various investments and interests at Priest Rapids, holding defendants accountable for full losses, damages, and claims, resulting from the sale of said Syndicate lands, or for any other acts committed by them effecting the Priest Rapids assets without full consideration of Dam Brothers interests." (R. 37)

LXXVIII

"Tufa Deposit Sold for Paltry Sum"

"That said deposit of Tufa was held by the Priest Rapids power site-industrial land holding company, the Washington Irrigation and Development Company, continually up to about the year 1949, when the Plaintiff learned in the private office of the Western General Counsel for the General Electric-Electric Bond & Share's Pacific Northwest interests, who also was president of the said land holding company, that he had just the week before sold the said Tufa deposit land, for thirty-five hundred dollars. The said sale was made by Defendants without consent or knowledge of Dam Brothers. That plaintiff made vigorous oral objections and complaint to said official, for making the said sale and for not consulting Dam Brothers before even negotiating the sale of the Tufa deposit section of land." (R. 37-38)

LXXXIII

"That in view of the fact that Defendants recently started to liquidate their utility interests located in the

State of Washington, it became evident to plaintiffs that defendants did not intend to develop the Priest Rapids project and therefore a written demand was made on June 14, 1951, for a full settlement in connection with the Priest Rapids project, in response to which defendants have made no reply." (R. 40)

LXXXIV

"That it was just learned by the plaintiffs that the defendants are giving away the entire Priest Rapids power site holdings, the main part of which property holdings have been held in trust by defendants dummy holding company, the Washington Irrigation & Development Company, since its organization in 1910, of which all its common stock has been held by the American Power & Light Company." (R. 40)

LXXXV

"That the Defendants have therefore by their own recent actions made the purpose of the joint adventure agreement incapable of performance." (R. 40-41)

2. MOTIONS TO DISMISS ELECTRIC BOND AND SHARE COMPANY AND AMERICAN POWER & LIGHT COMPANY.

The complaint was met by Electric Bond and Share Company and American Power & Light Company with motions to dismiss on the ground, among others, that those defendants were not doing business in the State of Washington.[4] Prior to the hearing on these motions, plaintiffs filed as of course an unverified amended complaint. (R. 57-73)

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4. Service upon Electric Bond and Share Company had consisted of mailing a copy of the Summons and Complaint to that defendant's office in New York (R. 56), and upon American Power & Light Company by leaving a copy of the Summons and Complaint with the statutory agent of the Washington Irrigation & Development Company (R. 78).

3. AMENDED COMPLAINT.

The amended complaint was more carefully tailored to meet the exigencies of pretrial procedure and the eventuality of a dismissal of the action as to Electric Bond and Share Company and American Power & Light Company. There were the following changes:

The **verified** complaint had recited the 100% ownership of Electric Bond and Share Company by General Electric Company until soon after the year **1925** but had **not** contained allegations of authorized agency. The amended complaint alleged specifically that Electric Bond and Share Company was the agent, servant and representative of General Electric Company and performed the acts alleged as the agent of General Electric Company (R. 57, 58). In addition, the chairman of the Board of General Electric Company, Mr. Charles A. Coffin, was alleged to have represented General Electric in conversations with the plaintiffs and Mr. Sidney Z. Mitchell. Mr. Mitchell, who had been identified in the verified complaint only as the president of Electric Bond and Share Company, was alleged to be the representative and agent of General Electric Company and chairman of the board of American Power & Light Company as well (R. 60).

The **verified** complaint had alleged simply that the "joint venture agreement" was entered into with Electric Bond and Share Company (R. 13, 20). The amended pleading alleged, "* * * the said defendants, General Electric Company, Electric Bond & Share and American Power & Light, and the said Dam Brothers, entered into a joint venture between all of the parties * * *" (R. 63).

The **verified** pleading had stated that the American Power & Light Company owned all the common stock "of its dummy holding company, the Washington Irrigation & Development Company" (R. 4). The amended pleading

alleged that the Washington Irrigation & Development Company was wholly controlled by American Power & Light Company **and** General Electric Company and was used by them "as a dummy and instrumentality" (R. 58).

Plaintiff had alleged in the **verified** complaint that about 1910 General Electric's "subholding and subsidiaries" made their first investments at Priest Rapids (R. 10). In the amended complaint they alleged that **General Electric Company** had made certain investments at Priest Rapids and that these were held through its "dummy" Washington Irrigation and Development Company (R. 61).

Whereas the **verified** pleading had alleged specifically that **Electric Bond and Share Company** had permitted five years of prosperity to pass without developing Priest Rapids (R. 36) although the "defendants could have easily financed and constructed said dam, * * *" (R. 35) the amended complaint simply recited that the defendants "did not then proceed with the construction of the dam at Priest Rapids, and prior to the time that construction could begin there had occurred a general depression in the United States * * *" (R. 69).

To cover some of the twenty-seven year period between the granting of the license to build the dam and the commencement of the action, the amended complaint added the general allegations that "* * * the defendants represented to said plaintiffs that they were continuing with said co-adventure * * *" and "* * * that none of defendants did state, nor did they represent at any time to said plaintiffs, that they were in anywise abandoning the prosecution of the co-adventure; that the plaintiffs herein did not and could not know that there was any complete or final repudiation or abandonment of the agreement of co-adventure until some time in the early part of the year 1951 when plaintiffs learned that defendants, and all of them, did not intend to

proceed with the development of the Priest Rapids project or with the prosecution of any of the obligations assumed by them; * * *" (R. 69, 70).

The omissions were equally significant:

Although the amended pleading continued to characterize the relationship of the parties by the conclusory allegations "joint venture" and "partnership," it failed to mention the conspiracies and breaches of contract described in the verified complaint as occurring before and shortly after passage of the water power legislation (R. 24, 26-27).

Also omitted were the allegations that General Electric Company had distributed to its stockholders all the common stock of Electric Bond and Share Company "soon after 1925" (R. 8), and that American Power & Light Company was wholly under Electric Bond and Share's domination "until November 1935" (R. 9).

Finally, although it was apparent from the prayer of the amended complaint that the defendants had never proceeded with the development of Priest Rapids, had never issued to plaintiffs any shares in a Priest Rapids power company "upon the passage" of the water power legislation (R. 65), and had never conveyed any interest in any companies or syndicates to plaintiffs at any time, the amended pleading studiously avoided the express allegations of the verified complaint that "with the passage by the United States Congress of the Water Power Bill, the Electric Bond & Share Company would at once start all the activities at Priest Rapids and the commitments would all then be taken care of together * * *" (R. 17, 18), that in 1922 Mr. Mitchell recommitted the "General Electric-Electric Bond and Share," giving his "positive assurance * * * that General Electric-Electric Bond were ready to get started right away for letting the construction contract dam at

Priest Rapids" (R. 30, 31), and that "the General Electric-Electric Bond and Share failed to fulfill **any** of their commitments to Dam Brothers during the periods mentioned in the complaint" (R. 39).

The amended complaint also contained a second cause of action incorporating the allegations of the first alleged cause of action and asking for recovery on the theory of benefits conferred.

4. ORDERS DISMISSING ELECTRIC BOND AND SHARE COMPANY AND AMERICAN POWER & LIGHT COMPANY.

After the filing of the amended complaint, the court entered its order (R. 92) quashing service and dismissing as to American Power & Light Company on the ground that defendant did not do business in the State of Washington. A similar order was later entered as to Electric Bond and Share Company (R. 125).[5] The granting of these motions left General Electric Company the sole defendant before the court.

5. SECOND AMENDED COMPLAINT.

After the dismissal of American Power & Light Company and pending consideration of the motion to dismiss Electric Bond and Share Company, the plaintiffs moved the court for, and were granted, permission to serve and file a second amended complaint (R. 93, 94-95).

The second amended complaint (R. 96) even more than the amended complaint was an embodiment of the "pleader's hope"[6] rather than a statement of the case as it was actually

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5. No appeal was taken by plaintiffs from these orders.

6. Clark, The Summary Judgment, 36 Minn. Law Review 567. At page 571 Judge Clark wrote: "The touchstone, thus, is the absence of a genuine issue as to a material fact. These are very carefully chosen words intended to express a definite thought. Various courts have attempted to better this formula by others which tend

"shown to be" by the verified complaint, the affidavits later filed, and the statements of plaintiffs' counsel to the court.

With General Electric Company the only defendant remaining before the court, the allegations were sharply pointed toward it. Allegations in the verified complaint that had referred only to Electric Bond and Share Company and allegations in the amended complaint that had referred to General Electric Company and Electric Bond and Share Company were changed to refer to General Electric Company alone, or General Electric Company acting through its subsidiaries.[7]

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to bend the principle to their ideas of policy—with deleterious results, as I shall point out later. But note, too, that the judge is to apply this principle after examining everything before him in the file: pleadings, affidavits, depositions or admissions. This is important. **He takes the case as it is shown to be, not as the formal allegations of a pleading may have embodied a pleader's hope.**"

7. The dismissals not only left General Electric Company the sole defendant before the court, but left a serious question as to whether on the basis of the allegations of the verified complaint, plaintiffs could proceed against General Electric alone, as the other defendants might well have been indispensable parties. Some of the changes made were the following:

(a) The verified complaint had alleged the concern of Mr. Mitchell, president of **Electric Bond and Share Company,** about the Dam Brothers' plans at Priest Rapids. (R. 12) The amended complaint referred to the "defendant corporations" (R. 62) and the second amended complaint referred to General Electric Company alone (R. 105-107).

(b) With reference to the formation of the joint venture, the verified complaint had alleged simply that it was formed with **Electric Bond and Share Company** (R. 13). The amended complaint alleged that it was formed with defendants, General Electric Company, Electric Bond and Share Company, and American Power & Light Company (R. 63), and the second amended complaint alleged that the joint venture was agreed upon with General Electric Company and its subsidiary and agent, Electric Bond and Share Company (R. 108).

(c) With regard to the lands to be acquired pursuant to the joint venture, the verified complaint had alleged that some of them were to be turned over to **Electric Bond and Share Company,** and others were to be acquired jointly with

In harmony with these changes, the second amended complaint contained lengthy allegations of the domination of Electric Bond and Share Company by General Electric Company and the use by General Electric of that corporation for its own purposes (R. 98-101). The amended complaint had alleged that Electric Bond and Share Company was the agent of General Electric Company (R. 57, 58) but had not alleged any facts on the basis of which the separate corporate entity of Electric Bond and Share Company could be disregarded. The **verified** complaint had alleged simply that Electric Bond and Share Company was "100% wholly

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Electric Bond and Share Company; that the syndicate was to be limited to Dam Brothers, **Electric Bond and Share Company,** and a few of its officials, and that the syndicate was actually formed with the Dam Brothers and **Electric Bond and Share Company** (R. 14, 15, 17, 19). The amended complaint referred to "defendant corporations and their various officials" (R. 65) and the second amended complaint alleged that the lands were to be turned over to or jointly acquired with General Electric Company or its subsidiaries or agents as directed by General Electric Company (R. 110).

(d) Regarding the start of the dam, the **verified** complaint had alleged **Electric Bond and Share Company** would start the activities at Priest Rapids (R. 17). The amended complaint referred simply to "defendants." (R. 66) and the second amended complaint referred to General Electric Company or its subsidiaries acting for it under its direction and control (R. 113, 116, 117-118).

(e) The **verified** complaint had alleged that the Dam Brothers referred the attention of Electric Bond and Share to the tufa deposit, and that officials of American Power & Light and General Electric Company "expressed interest" in it (R. 22, 23). The second amended complaint referred to General Electric Company and to its representatives and agents and to the representatives and agents of subsidiaries under the control of General Electric Company (R. 114).

(f) The allegations of the **verified** complaint relating to the post license period had referred to the "defendants" and to Electric Bond and Share Company's having permitted the period to pass without developing the Priest Rapids power site (R. 34 et seq.). The amended complaint referred simply to "defendants" (R. 68) and the second amended complaint referred to General Electric alone or General Electric and its subsidiaries (R. 117-118).

owned" by General Electric Company until "soon after 1925" (R. 8) and General Electric Company was "behind its development plans" (R. 16).

The only specific allegation in the second amended complaint, on the subject of assurances of performance by "defendants" and lack of knowledge by plaintiffs of abandonment of the joint venture, related to matters occurring about or before 1925:

XXI.

"In further performance of said joint venture agreement on their part to be performed, the plaintiffs acquired for the land syndicate formed for such purpose under the joint venture agreement, the fifty-five thousand (55,000) acres of land for irrigation, and other lands, some of which had previously been acquired by the defendant, General Electric Company, acting through a subsidiary controlled by it, and including lands to be included in the corporation Townsite Terminal Company above referred to. The plaintiffs further in the performance of said joint venture agreement on their part to be performed, at the request of and under the direction of the defendant, General Electric Company, and its agents, representatives and subsidiary corporations under its domination, direction and control, secured the above-mentioned Tufa deposits immediately adjacent to the proposed dam and townsite, in the contemplation of the parties, and which deposits it was agreed between the parties were to be turned over to a corporation to be organized as the Tufa Natural Cement Company, which was within the contemplation of such joint venture agreement." (R. 116-117)

XXII.

"After the passage of legislation favorable to the development of the Priest Rapids project by the Con-

gress of the United States in 1920, the General Electric Company through its agents and representatives, and through its subsidiary, Electric Bond & Share Company, dominated, directed and controlled by the defendant, General Electric Company, and through its complicated [16] and confusing and in some instances wholly fictitious, corporate setups, caused diamond drilling and other engineering services to be done and performed at the said Priest Rapids site, and in the vicinity thereof, for the purpose of making estimates and determinations as to the probable costs and specification necessary for the construction of such proposed dam and other improvements. Prior to such times the defendant, by and through one of its subsidiaries acting under its domination, direction and control had secured a permit and later a license to construct the proposed dam for the purpose of producing and manufacturing hydroelectric power at said Priest Rapids site." (R. 117)

XXIII.

"The said permit for the construction of said dam was granted about the year 1925, and at said time, by public declaration through the press and by private communication to the plaintiffs by and through the defendant, General Electric Company and its subsidiaries acting under its domination, direction and control, affirmed and reaffirmed its intention to **immediately** proceed with the proposed project, and these plaintiffs believed and relied upon the statements and assurances so made by and under the direction of the defendant, General Electric, that such project would be pushed to full realization and fruition." (R. 117-118)

The general allegations on this subject, which had first appeared in the amended complaint, were amplified as follows:

XXIV.

"The said defendant, General Electric Company, to the knowledge of these plaintiffs, at no time abandoned the performance of such joint venture agreement on its part, nor did it notify the plaintiffs to that effect, but at all times advised and assured these plaintiffs that it still proposed and intended to proceed with the said proposed plans, but following the securing of such license, about the year 1929, the entire United States was in a depression following World War No. I, and following this the United States entered World War No. II, all of which [17] resulted in Government controls of metals and materials which would be needed and required in the prosecution of such development and project, and as a result thereof the said defendant, General Electric Company, was hampered and delayed in prosecuting and proceeding with the development of said Priest Rapids, but at all times the said General Electric Company advised and assured the plaintiffs that it fully intended to perform its part of said joint venture agreement, which advice and assurances the plaintiffs believed and relied upon." (R. 118)

Allegations of the **verified** complaint that had been omitted significantly from the amended complaint were also omitted from the second amended complaint but in addition the second amended complaint omitted any reference to the **date** of the making of the alleged "joint venture" agreement and to the fact that it was oral.[8]

The second amended complaint, like the earlier pleadings, showed from its prayer that the defendants had never carried out **any** of their alleged commitments.

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8. The verified complaint alleged clearly that the agreement was made in 1913 (R. 13, 14), but did not expressly allege the agreement was oral. The amended complaint specified April, 1913 as the date of the agreement and alleged that it had never been reduced to writing (R. 63).

6. MOTIONS TO STRIKE AND TO MAKE MORE DEFINITE AND CERTAIN—GRANTED IN PART; MOTION TO DISMISS—DECISION WITHHELD; ARGUMENT OF COUNSEL ON LACHES.

General Electric filed, concurrently, motions to strike, to make more definite and certain, and to dismiss (R. 127-134). The motions were heard by the court. Although the arguments dealt with General Electric Company's contention that the second amended complaint should be dismissed because of laches, plaintiffs' counsel made **no** reference to **any evidence of facts** which would make inapplicable, for the twenty-seven year period between the granting of the license to build the dam and the commencement of the action, accepted rules of law on accrual of causes of action, limitations and laches. There was every indication from the lengthy statement of plaintiffs' counsel (R. 144-158) that there was no such evidence. Thus, plaintiffs' counsel stated:

> "Now, immediately on the passage of that legislation, the General Electric began to do some diamond drilling down on this project, but they scattered their energies over the United States in about 265 different places, and because of the fact that they could get easier picking in all of the smaller places where they would have absolute control themselves, **they neglected this place**, and your Honor has read many, many, many times in the general public news where the General Electric is going to do this at Priest Rapids and General Electric and General Electric, and so on." (R. 147)
>
> "* * * They wanted some means of contacting the public and the General organized the Electric Bond and Share and did all there was to it and trained their men in the General Electric and set them over the Electric Bond and Share and owned every single share of stock in that company until the S.E.C. told them to distribute that stuff to the stockholders of the General Electric."[9] (R. 147-148)

9. The SEC action referred to by counsel for plaintiffs and stated by him to be reported in SEC Vol. XI, was against Electric

"The very same grasshoppers, if your Honor please, are sitting on the same bushes up on that hill now. You can't tell any difference in the territory there at all. They did do a lot of diamond drilling, but they got all their money back, no doubt, from deductions in their income taxes and things of that kind * * *." (R. 150-151)

"Now, then, all we want these people to do is to come in and answer and show us, show the Court, that they have done anything except very superficial work there in doing some diamond drilling and the camouflaging the ownership there, and whenever the General Electric would come out and talk about it, the papers would say General Electric is going to do this and General Electric is going to do that." (R. 152)

The court granted in part the motions to strike and make more definite and certain, and notified counsel that it would withhold decision on the motion to dismiss until plaintiffs had complied with the order on the two other motions. Plaintiffs, in compliance with the order, consented to the clerk's deleting the portions ordered stricken and inserting allegations that the agreement was oral, was made in 1913, and was made for the defendants by Charles A. Coffin, Sidney Z. Mitchell and Henry Pierce.

7. RENEWED MOTION TO DISMISS GENERAL ELECTRIC COMPANY; DENIED ON GROUND NOT TO BE TREATED AS MOTION FOR SUMMARY JUDGMENT UNTIL AFTER ANSWER.

General Electric Company then renewed its motion to dismiss, supporting its renewed motion with affidavits estab-

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Bond and Share, and the decision stated that General Electric had disposed of all its investment in Electric Bond and Share in **1925.**

Statements of counsel have been considered in the determination of whether or not there is a genuine issue as to material facts. See *Creel v. Lone Star Defense Corporation,* 171 F.2d 964 (Cir. 5, 1949) at 967.

lishing these facts: Charles A. Coffin died in 1926; Sidney Z. Mitchell in 1944; and Henry J. Pierce more than 30 years before; Edwin Wilbur Rice was president of General Electric Company from 1913 to 1922 and died in 1935; Priest Rapids Power Company, Terminal Townsite Company and Tufa Natural Cement Company had never qualified to do business in the State of Washington as either foreign or domestic corporations at any time since 1912.[10]

Plaintiffs filed in opposition to the motion an affidavit of Milton E. Dam (R. 173-185). Apart from quotations about Charles A. Coffin published in various magazines during the 1920's, the affidavit did **not** refer to any event occurring within **thirty** years of the commencement of the action.[11]

The court then advised the parties that since affidavits had been submitted in support of the motion, it proposed to

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10. The verified, the amended and the second amended complaints had all alleged that the Priest Rapids Power Company was to be formed "upon passage of federal power legislation." The verified and amended complaints had alleged the Terminal Townsite Company was to be incorporated when the power company was formed, and the second amended complaint alleged it was to be formed "immediately" following passage of favorable legislation. There was **no** allegation in any of the complaints that these companies had ever been incorporated.

11. The tenor of the entire affidavit is the same as that of the verified complaint. The following statement is an example:

> "That during the Joint Adventure conferences, Dam Brothers were assured that the plans desired by and backed by the General Electric, would be carried; that with the start of the activities following the conferences, the Dam Brothers were to work with and operate under Mr. Mitchell, president of Electric Bond, which organization had the legal structure and engineering equipment; that the permanent organizations for the Power Company, the Terminal Townsite Company, for vital mining and minerals, would all be formed after the federal water power legislation had been obtained.
>
> "That as late as 8 years after the Joint Adventure conferences, following the enactment of the federal legislation, one of the main achievements accomplished, and Mr. Coffin was ready to retire at the age of 79, he still had to be consulted by Mr. Mitchell, and obtain Mr. Coffin's approval." (R. 184)

treat it as one for summary judgment under Rule 12(b).[12] Plaintiffs were granted a period of two weeks within which to file additional affidavits or other matters they wished to submit for the court's consideration (R. 188).

Two months later plaintiffs filed an additional affidavit (R. 190-196). This affidavit, too, failed to refer to any facts relating to the defense of limitations and laches. The only specific allegations regarding the relationship of the plaintiffs to General Electric Company referred to a period **twenty-seven or more years** before the commencement of the action.[13]

The court next wrote counsel advising them that in its opinion it was "doubtful at least that such defenses (laches, statute of frauds, and limitations) could properly be passed upon by order on motion to dismiss treated as a motion for

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12. Rule 12(b) provides in part:
"If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

13. The tenor of this affidavit, like that of the affidavit previously filed and like the argument of plaintiffs' counsel at the hearing on the motion to dismiss, was the same as that of the verified complaint. The court refused at first to consider it at all because it was filed late, because it was in effect an answering argument to a memorandum of General Electric interposed directly by a litigant represented by counsel, and finally because "the affidavit contained little, if any, direct factual statement to which the affiant could testify if he were a witness in the case" (R. 197). The court later advised counsel that on the motion for summary judgment it was considering all the material in the file of the case (R. 201, 237).
The affidavit referred to "the complete mass of connecting evidence" (R. 194) and stated that "* * * the Complaint and Documents already filed contain honest to God facts and truth about this affair * * *" (R. 195). Such allegations do not create genuine issues. See the discussion at pp. 33 to 35 *infra*.

summary judgment" (R. 201)[14] and upon this ground denied the motion.[15]

8. ANSWER BY GENERAL ELECTRIC COMPANY.

After denial of the motion, General Electric Company filed its answer. It admitted that General Electric Company had caused Electric Bond and Share Company to be incorporated in 1905; that Charles A. Coffin was the founder of General Electric Company and chairman of the board of that company in 1913; that in the same year Electric Bond and Share Company was wholly owned by General Electric Company and Sidney Z. Mitchell was president of Electric Bond and Share; that Congress enacted the Federal Water Power Act in 1920; that the public files of the Federal Power Commission showed that a preliminary permit to build a dam at Priest Rapids was issued to Washington Irrigation and Development Company in 1921 and a license in 1925; and certain geographical facts about the Columbia River. The remaining allegations were denied and affirmative defenses pleaded, including the statute of frauds, limitations and laches (R. 204-214).

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14. The court was probably incorrect in concluding that it was doubtful that it could pass on the motion for summary judgment prior to the filing of an answer. See *Suckow Borax Mines Consol. v. Borax Consolidated*, 185 F.2d 196 (Cir. 9, 1950).

The letter indicates the care with which the court considered the whole matter and its commendably cautious attitude toward clearly highlighting the issues raised by General Electric Company's motion.

15. With reference to its denial of the motion, the court stated: "I assume General Electric Company in its answer will affirmatively plead the three defenses to which I have above referred, and will renew its motion as a motion for summary judgment. I see no reason why the motion then could not be considered and passed upon by the court on the basis of the complaint and answer, and affidavits and other factual material already submitted in connection with the motion to dismiss, and on counsels' various memoranda and lists of authorities heretofore submitted on the motion" (R. 201-202).

9. MOTION FOR SUMMARY JUDGMENT.

Concurrently with the answer, General Electric Company filed a motion for summary judgment and an additional affidavit establishing these facts: That the files of the Federal Power Commission in Washington, D. C., showed that in 1920 Washington Irrigation and Development Co. had applied for a preliminary permit for a power project at Priest Rapids; the permit was granted on March 3, 1921, and pursuant to the permit, a license was issued in March 1925, which, as amended in March 1927, required that construction be commenced on or before March 1, 1929; the license was terminated by the Commission on June 14, 1929 because of the licensee's failure to commence construction; an application for a new license on the same project was filed by the Washington Irrigation and Development Co. in 1929 and was denied; and on March 2, 1930, the executive secretary of the Commission wrote to the applicant that the required showing not having been made, the second license application had been denied and the file closed; that there was no activity regarding Priest Rapids so far as shown by the public files of the Federal Power Commission from the closing of the Washington Irrigation and Development Co. files on March 2, 1930 until July 16, 1952, when plaintiffs instituted this action (R. 214-220).[16]

10. MOTION TO ADJOURN HEARING.

After service of the motion for summary judgment, plaintiffs filed a motion for an order continuing and adjourning the hearing on the motion upon the ground that there were genuine issues of material fact in the action. Plaintiffs' attorney filed a lengthy affidavit (R. 222 to 235) which specified in detail matters on which there was a factual dispute.

16. The affidavit was supported by certified copies of the docket sheet and other documents on file in the office of the Federal Power Commission.

None of these matters was material to the defenses of limitations or laches, and the affidavit contained no allegations controverting the showing made by General Electric Company, or stating evidence of facts which would make inapplicable accepted rules on accrual of causes of actions, limitations and laches.[17]

The court ordered plaintiffs' motion stricken on the basis that there was no authority for such a motion and on the further ground that the motion merely raised the very issue before the court—whether or not there was a genuine issue as to a material fact.[18]

11. OPINION; ORDER GRANTING MOTION FOR SUMMARY JUDGMENT; JUDGMENT.

On August 27, 1956, the court filed its opinion (R. 235) and granted defendant's motion on the ground of limitations and laches. Thereafter, on August 3, 1956, summary judgment was duly entered (R. 255).

III.

ARGUMENT

A. On Motion for Summary Judgment the Duty of the District Court Was to Pierce the Formal Allegations of the Pleadings, Reach the Merits of the Controversy, and Determine Whether There Was any Genuine Issue as to any Fact Material to the Defenses Raised by Defendant, Namely, the Statute of Limitations and Laches.

Rule 56 by its plain terms and by construction with other rules[19] requires the court upon appropriate motion, to pierce

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17. See the discussion *infra*, pp. 33-34, for the effect of mere assertions that there are disputed issues of fact without specifying what the evidence would be.

18. At this time the court also wrote counsel advising them that in passing upon the motion it would consider "all the relevant material—factual and legal—in the file of the case" (R. 237).

19. Tests of the sufficiency of the pleadings and the raising of matters which are the subject of the common law demurrer are amply provided for by Rule 12. See also Rules 8, 9 and 10.

the formal allegations of the pleadings, reach the merits of the controversy, and determine in advance of trial if there is any "genuine issue as to any material fact."[20] In making this determination, the court must act with caution, as the constitutional right to trial by jury is involved,[21] and if a genuine issue of fact material to the claim or defense asserted by the motion is found, the motion must be denied. But the rule grants to litigants the right to such determination because "A court has refused in granting justice when it forces a party to an expensive trial of several weeks duration to meet purely formal allegations without substance fully as much as when it improperly refuses to hear a case at all,"[22] and because of "the danger that the threat of such a trial will be used as a type of harrassment to coerce a settlement."[23]

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20. For an excellent description of the function of the District Court on motion for summary judgment, see the recent Ninth Circuit case, *Byrnes v. Mutual Life Insurance Company of New York,* 217 F.2d 497 (Cir. 9, 1954).

See also *Suckow Borax Mines Consol. v. Borax Consolidated, supra* fn. 14, where the Court stated at 205: "The whole purpose of the summary judgment rule is to separate real and genuine issues from mere formal or pretended issues." and Clark, *op. cit.*, supra, note 6 at 573 where Judge Clark stated: "* * * the summary judgment searches for the merits * * *."

21. *Griffeth v. Utah Power & Light Company,* 226 F.2d 661 (Cir. 9, 1955).

22. Clark, *op. cit.* supra, fn. 6, at 578.

23. MacAsville and Snell, Summary Judgment under the Federal Rules—When an Issue of Fact is Presented, 51 Mich. L. Rev., 1143, at 1143 and 1144. The court below may have had this reason for the summary judgment procedure in mind when in oral argument counsel for the plaintiffs stated:

> "But, if your Honor please, this is what ought to be done. There is a chance that it might be done, and I am certainly not suggesting that anybody else has waved any encouraging flags in my face. I don't want it to appear that way, but I think this: * * *"
>
> "* * * they have done nothing for the Dam Brothers, and I was just going to conclude by saying, if your Honor please,

The rule makes the procedure available to both plaintiffs and defendants, recognizing the principle that "while the patently unmeritorious claim has not so often recurred as the sham defense, yet when the former does arise, it affords as much hardship to the other party and as much burden upon judicial machinery as the latter."[24]

Since the wholesome purpose of Rule 56 can be achieved only if the court reaches the merits, it is the duty of both parties to disclose fully what the evidence will be on the issues raised by the motion.[25] Formal allegations in plead-

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that if your Honor would peruse these, I can't expect the Court to be Solomon and know everything, I am just assuming that it is necessary to read briefs and things of that kind in order to reach correct conclusions, and if that could be done **and the case remain status quo until probably in the next term, that we might avoid the necessity of a long trial in this court if the Court was to sustain our complaint.**" (R. 154-157)

See *Altman v. Curtiss-Wright Corporation*, 124 F.2d 177 (Cir. 2, 1941) where, in affirming a summary judgment, the court stated at 180: "There was no issue to try, and the remedy of summary judgment is designed to bar exactly such opportunities for unjust exactions to escape the delay and expense of a trial."

24. Pike and Willis, The New Federal Deposition-Discovery Procedure: II, 38 Colum. L. Rev. 1436 at 1456.

25. See *Engl v. Aetna Life Ins. Co.*, 139 F.2d 469 (Cir. 2, 1943) where the court stated at 473, "If one may thus reserve one's evidence when faced with a motion for summary judgment there would be little opportunity 'to pierce the allegations of fact in the pleadings' or to determine that the issues formally raised were in fact sham or otherwise unsubstantial. It is hard to see why a litigant could not then generally avail himself of this means of delaying presentation of his case until the trial. So easy a method of rendering useless the very valuable remedy of summary judgment is not suggested in any part of its history or in any one of the applicable decisions."

See also *Chambers & Company v. Equitable Life Assurance Soc.*, 224 F.2d 338 (Cir. 5, 1955) at 345 where the court stated: "It was not permissible that Appellant hold back any evidence or fail to make a full disclosure of the facts upon which it relied for recovery. Disclosure under summary judgment must be full and complete." And *Carr v. Goodyear Tire & Rubber Co.*, 64 F. Supp. 40 (D.C.

ings, that may be sufficient for other purposes, do not sufficiently disclose the evidence for the purpose of Rule 56, for if a genuine "issue could be raised by the pleadings alone, Rule 56 would be a nullity * * * it would merely duplicate the motion to dismiss."[26] Nor does a party fulfill the duty

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Calif., 1945) where the court, adopting the language of another case, stated at page 51: "* * * on such a motion it is the duty of counsel for plaintiff and defendant to fully disclose what the evidence will be on the issues raised by the motion * * *."

26. *Lindsey v. Leavy,* 149 F.2d 899 (Cir. 9, 1945). The complete statement appears at page 902: "The sufficiency of the allegations of a complaint do not determine the motion for summary judgment. Cases dealing with and construing Rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, clearly indicate to the contrary and if this were not the case, Rule 56 would be a nullity for it would merely duplicate the motion to dismiss." For other Ninth Circuit cases, see: *Byrnes v. Mutual Life Insurance Company of New York,* supra fn. 20 at 500; *Koepke v. Fontecchio,* 177 F.2d 125 (Cir. 9, 1949). At 127 the court stated: "The purpose of the procedural rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A., providing for the rendering of summary judgment is to dispose of cases where there is no genuine issue of fact even though an issue may be raised formally by the pleadings."

For cases from other jurisdictions see: *Appolonio v. Baxter,* 217 F.2d 267 (Cir. 6, 1954) at 270; *Reynolds v. Maples,* 214 F.2d 395 (Cir. 5, 1954) at 399; *Zampos v. United States Smelting Refining and Min. Co.,* 206 F.2d 171 (Cir. 10, 1953) at 173, 174; *Surkin v. Charteris,* 197 F.2d 77 (Cir. 5, 1952) at 79; *Christianson v. Gaines,* 174 F.2d 534 (Cir. D.C., 1949) at 537; *Engl. v. Aetna Life Ins. Co., supra* fn. 25, at 472-473; *Meyers v. District of Columbia,* 17 F.R.D. 216 (D.C. District of Columbia, 1955) at 220; *Kowalewski v. City of Hastings,* 112 F. Supp. 825 (D.C. Minn. 1953) at 827-828; *McClellan v. Montana-Dakota Utilities Co.,* 104 F. Supp. 46 (D.C. Minn. 1952) at 56; *Crosby v. Oliver Corporation,* 9 F.R.D. 110 (D.C. Ohio, 1949) at 112; *Geller v. Transamerica Corporation,* 53 F. Supp. 625 (D.C. Del. 1943) at 629.

The only circuit in which the question has arisen and in which this rule has not been followed is the Third. For an excellent discussion of the rule and criticism of the Third Circuit holdings, see Wright, Rule 56(e): A Case Study on the Need for Amending the Federal Rules, 69 Harv. L. Rev., 839.

In its report of October 1955 on Proposed Amendments to the Rules of Civil Procedure for the United States District Courts, the Advisory Committee on Rules for Civil Procedure stated the following: "The purpose of Rule 56 is to pierce the formal allegations of the pleadings and reach immediately the merits of the controversy. If pleading allegations are sufficient to raise a genuine issue as

of full disclosure by mere denials of matters in support of the motion,[27] expressions of hope that evidence will be available at the time of trial,[28] simple assertions that a question of facts exists,[29] or statements that further evidence will be produced at trial.[30]

When a party moves for summary judgment and supports its motion with "evidence on which, taken by itself, it would be entitled to a directed verdict * * *" it rests upon the other party "at least to specify some opposing evidence which it can adduce and which will change the result."[31] If

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against uncontradicted evidentiary matter, this remedy then becomes substantially without utility * * *. The view of most cases and commentators is that, where the motion for summary judgment is supported by depositions or affidavits, the opposing party must make a similar presentation to show the existence of a genuine issue of fact, or suffer judgment to be entered." * * *

See also discussion in Clark, op. cit., supra, fn. 6, at 571, and MacAsville and Snell, op. cit., supra, fn. 23.

27. *Piantadosi v. Loew's Inc.*, 137 F.2d 534 (Cir. 9, 1943). At 536 the court stated: "Under this rule (Rule 56(e)) mere denials, unaccompanied by any facts which would be admissible in evidence at a hearing, are not sufficient to raise genuine issue of fact."

28. *Poole v. Gillison*, 15 F.R.D. 194 (D.C. Ark., 1953), at 198.

29. *Felt v. Ronson Art Metal Works*, 107 F. Supp. 84 (D.C. Minn., 1952) at 85; *Wier v. Texas Co.*, 79 F. Supp. 299 (D.C. La. 1948) at 311.

30. *Appolonio v. Baxter, supra* fn. 26 at 270 et seq.; *Engl v. Aetna Life Ins. Co., supra* fn. 25, at 473.

31. *Byrnes v. Mutual Life Insurance Company of New York, supra* fn. 20 at 501.

See also: *Suckow Borax Mines Consol. v. Borax Consolidated, supra* fn. 14 at 205; *Gifford v. Travelers Protective Ass'n.*, 153 F.2d 209 (Cir. 9, 1946) at 211; *Piantadosi v. Loew's Inc., supra* fn. 27, at 536; *Chambers & Company v. Equitable Life Assurance Soc., supra* fn. 25 at 345 et seq.; *Appolonio v. Baxter, supra* fn. 26, at 270; *Repsold v. New York Life Insurance Company*, 216 F.2d 479 (Cir. 7, 1954) at 483; *Marion County Cooperative Ass'n. v. Carnation Co.*, 214 F.2d 557 (Cir. 8, 1954) 561-562; *Reynolds v. Maples, supra* fn. 26, at 399; *Zampos v. United States Smelting Refining and Min. Co., supra* fn. 26; *Surkin v. Charteris, supra* fn. 26, at 79; *Nahtel Corporation v. West Virginia Pulp & Paper Co. et al*, 141 F.2d 1 (Cir.

the opposing party does not specify such evidence, it is the duty of the court to proceed on the record before it[32].

B. Defendant Presented Evidence Which, of Itself, Established That (1) Defendant, to the Knowledge of Plaintiffs, Never Performed the Alleged 1913 Oral Contract and, Many Years Before the Commencement of the Action, Made Clear by Its Acts and Conduct That Its Part of Such Alleged Oral Contract Would Not Be Performed, and (2) All Individuals Who Allegedly Acted for Defendant in Making the Alleged Oral Contract Had Died Eight Years or More Before the Commencement of the Action.

The defendant made its motion for summary judgment upon filing its answer to the second amended complaint. Upon consideration of the matter the District Court had before it the following evidence (in addition to admissions in plaintiffs' affidavits and earlier pleadings):

An admission in the second amended complaint that the defendant had never formed a "Priest Rapids Power Company" or a "Terminal Townsite Company" nor issued shares

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2, 1944) at 3; *Engl v. Aetna Life Ins. Co., supra* fn. 25, at 471-473; *Meyers v. District of Columbia, supra* fn. 26, at 220-221; *McClellan v. Montana-Dakota Utilities Co., supra* fn. 26, at 56; *Felt v. Ronson Art Metal Works, supra* fn. 29, at 85; *Hisel v. Chrysler Corp.*, 94 F. Supp. 996 (D.C. Mo., 1951) at 1003; *Wier v. Texas Co., supra* fn. 29, at 311; *Peckham v. Ronrico Corporation*, 7 F.R.D. 324 (D.C. Puerto Rico, 1947) at 326; *Carr v. Goodyear Tire & Rubber Co., supra,* fn. 25, at 51; *Garcia v. United States,* 108 F. Supp. 608 (U.S.C.C. 1952) at 613.

This rule, like any other, is of course applied with discretion and flexibility. Thus, there are instances where the moving parties own affidavits may show that there are factual conflicts which should properly be decided after full hearing. This type of case occurs where the moving party's affidavits admit circumstances from which a trier of fact could draw opposing inferences and the moving party states as a fact that one inference should be drawn rather than another. For a Ninth Circuit case of this type, see *Hoffman v. Babbitt Bros. Trading Co.*, 203 F.2d 636 (Cir. 9, 1953).

32. *Engl v. Aetna Life Ins. Co., supra,* fn. 25. *Carr v. Goodyear Tire & Rubber Co., supra,* fn. 25, at 51.

in any of those companies to the plaintiffs, although the defendant had allegedly agreed to form those companies upon passage of the Federal power legislation and issue shares in them to the plaintiffs;

An affidavit that these corporations had never been formed or qualified to do business in the State of Washington since 1912;

An admission in the second amended complaint that the defendant had never built the dam at Priest Rapids, although the defendant had allegedly agreed in 1913 to "diligently prosecute" all activities for the development of the Priest Rapids project, and in 1925 had allegedly reaffirmed its intention to "immediately proceed" (R. 118) with the project;

An affidavit that an application had been filed in 1920 with the Federal Power Commission by a Washington Irrigation and Development Co. for a preliminary permit for a power project at Priest Rapids; that the permit had been granted in 1921, followed by issuance of the license in 1925; that the license was terminated in 1929 and an application for a new license filed by that company in the same year; that the application was denied and in 1930 the file of the Federal Power Commission closed; and that after 1930 there was no activity by anyone regarding Priest Rapids on the Columbia River, so far as was shown by the public files of the Federal Power Commission, up to the time plaintiffs commenced this action on July 16, 1952;

Affidavits that all the persons described in the second amended complaint, as the individuals who had acted for defendant in making the oral agreement, had died eight or more years before the commencement of the action.

This evidence, taken by itself, fully established that the action was founded upon an alleged oral contract made in

1913; that the defendant, to the knowledge of plaintiffs, had never performed such alleged oral contract and, many years before the commencement of the action, made it clear by its acts and conduct that its part of such alleged oral contract would not be performed; and that all individuals who had allegedly acted for defendants in making such alleged oral contract had died eight years or more before the commencement of the action. The material facts are set forth in the opinion of the District Court in these words:

> "By the oral joint venture contract, defendant agreed immediately after the passage of Federal water power legislation to organize a corporation to be known as the Priest Rapids Power Company with a capital stock of $40,000,000, and to turn over $500,000 worth of the stock to the plaintiffs; to organize a corporation to be known as the Terminal Townsite Company, and transfer 10% of the stock to plaintiffs; and diligently to build a dam across the Columbia River at the Priest Rapids site, and allied works for the generation of electrical energy, and the irrigation of arid lands. The passage of the Federal water power legislation occurred in March, 1920. There is no allegation that defendant caused any corporations to be incorporated or transferred any stock in any corporation to the plaintiffs. It may properly be inferred from the defendant's uncontroverted showing on that point that no corporation was ever organized. Defendant's failure to do so breached the contract. Defendant did not build the dam and plaintiffs did not commence their action until 32 years after the passage of the Federal water power act. Defendant[33] did procure a license from the

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33. The District Court assumed "for the purpose of deciding the motion for summary judgment" that Washington Irrigation & Development Co. was a "dominated subsidiary and agent of defendant" (R. 245). This assumption is overly-generous to plaintiffs for any period and especially for the period after 1925. The verified complaint alleges that:

(a) Since the organization of Washington Irrigation & Development Co. in 1910 all of its common stock has been owned by Amer-

Federal Power Commission to build the dam, it is true, but the license was finally canceled and the file closed on July 2, 1930. The file was never reopened. The very fact that defendant during the ensuing 19 years made no further application for a permit to build the dam should have been sufficient indication to anyone making inquiry that the project had been abandoned so far as defendant was concerned * * *." (R. 248-249)

"* * * In the present case, plaintiffs' action is based upon an oral contract alleged to have been made in 1913, and they did not commence the action until 1952, eight years after all of the individuals whom they claim acted for the defendant corporation in making the contract had died. The plaintiffs, according to the allegations of their own pleading, did not make a formal written demand upon the defendant for the performance of the oral contract until 1951, many years after the last survivor of defendant's potential witnesses regarding the oral agreement had passed away. It is difficult to imagine a litigant being put to more serious disadvantage than to be called upon to defend against an eight and one-half million dollar lawsuit based upon a 39-year-old oral contract, when the only witnesses who could possibly testify in behalf of the defendant as to whether or not the contract was actually made, and, if so, as to what were its terms and conditions, have been dead for eight years or more." (R. 252)

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ican Power & Light Company (R. 9).

(b) From May 1917 until November 1935 American Power & Light Company was wholly under the domination of Electric Bond and Share Company (R. 9).

(c) Electric Bond and Share Company was 100% wholly-owned by General Electric Company from 1905 to 1925 (R. 8).

It further shows (d): "Soon after 1925 General Electric Company distributed the Electric Bond and Share common stock among the stockholders of General Electric Company" (R. 8).

The record also contains references by counsel for plaintiffs to SEC Volume XI which shows that General Electric had disposed of all of its investment in Electric Bond and Share in 1925.

C. The District Court Properly Determined That There Was No Genuine Issue as to Any Material Fact.

On this appeal plaintiffs rely upon the allegations in paragraphs XXI to XXIV (quoted in full at pages 21 to 23 above) of the second amended complaint which were denied by the answer. Plaintiffs claim that because of these allegations there is a genuine issue as to the facts material to the defenses of limitations and laches. Paragraphs XXI to XXIII of the second amended complaint allege matters which all occurred at or before 1925 and do not contain allegations with respect to matters occurring in the following 27 years prior to the commencement of the action. Paragraph XXIV, however, alleges generally that "at all times" the defendant "advised and assured" plaintiffs that it "still proposed and intended" to perform its part of the oral contract and that plaintiffs relied on such advice and assurances.

It appears to be the contention of plaintiffs that under these pleadings, (a) plaintiffs are "entitled to submit evidence" at trial in support of the general allegations in paragraph XXIV and (b) such *right* to submit evidence creates a genuine issue of material fact (Appellants' Brief at page 23). Upon this basis plaintiffs assert the right to force defendant to a trial for breach of a 39-year-old oral contract long after the death of all potential witnesses to its existence or non-existence.

The want of merit in plaintiffs' contention is manifest when it is examined in the context of the purpose of Rule 56 and the record before the District Court.

1. THE DETERMINATION OF THE DISTRICT COURT IS FOUNDED UPON THE EXPRESS PURPOSE OF RULE 56.

Plaintiffs' contention that it would be *entitled* to submit evidence, if such evidence could be found, begs the question and seeks to ignore the purpose of Rule 56. The issue before

the District Court was whether there was a genuine dispute of material fact — whether any evidence actually existed which could be adduced at the trial to change the result— not the breadth of the issues framed by the pleadings. It is the purpose of Rule 56 to penetrate the formal allegations in the pleadings, reach the merits of the controversy, and determine whether evidence actually exists which could be adduced at the trial to create a genuine issue of material fact.[34]

Here the defendant moved for summary judgment on the ground of limitations and laches and specified evidence which of itself established all the facts material to those defenses, namely, that defendant had breached the alleged oral contract and made clear by its acts and conduct that its part of the alleged oral contract would not be performed but had been abandoned long before the commencement of the action. Such showing squarely raised the issue whether any evidence actually existed which could change the result. It called for specification of plaintiffs' actual evidence on the issue. The issue was never met by plaintiffs. The ruling which this Court has adopted from the Second Cicuit is fully applicable to the case at bar:

> "When a party presents evidence on which, taken by itself, it would be entitled to a directed verdict if believed, and which the opposite party does not discredit as dishonest, it rests upon that party at least to specify some opposing evidence which it can adduce and which will change the result.[35]

If the rule were otherwise and if these plaintiffs could stand upon the general allegations of the pleadings without specifying evidence on which the Court could reach a rational

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34. See authorities cited under Section III A, pages 30 to 35, above.

35. *Radio City Music Hall Corporation v. U. S.*, 135 F.2d 715 (Cir. 2, 1943) at 718, quoted with approval in *Byrnes v. Mutual Life Insurance Company of New York*, supra, fn. 20 at 501.

determination that there was a genuine issue of material fact, the remedy of summary judgment "would be a nullity."[36]

2. THE DETERMINATION THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT IS SUPPORTED BY THE ENTIRE RECORD BEFORE THE DISTRICT COURT.

Plaintiffs filed three affidavits:[37] the first and second in opposition to the renewed motion to dismiss (which the District Court originally intended to treat as a motion for summary judgment) on the grounds that the claims were barred by the statute of limitations and laches; and the third in support of plaintiffs' motion to adjourn the hearing on motion for summary judgment on the ground that there were material facts requiring trial.

These lengthy affidavits, occupying 31 pages of the record on appeal, state that there is a "mass of connecting evidence" and a "vast amount of evidence," but to the extent any evidence is specified, it relates only to occurrences twenty-seven years or more before the commencement of the action. The third affidavit simply asserts that there are disputed facts, outlines the allegations of the complaint which are denied by the answer, and concludes with the statement that the plaintiffs desire a trial.

A review of the verified complaint, the amended complaint and the transcript of the argument of plaintiffs' counsel to the District Court (at the hearing on the motion to dismiss) also shows them to be devoid of any specification of any matter which could be adduced at the trial to "change the result" reached by the District Court. In addition

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36. *Lindsey v. Leavy*, supra fn. 26, at 902.

37. A fourth affidavit, not relevant here, was filed by Milton Dam apparently after receiving a notice from District Court which is not in the record on appeal (R. 135).

(a) The original verified complaint, which consisted of 87 numbered paragraphs of detailed allegations, contained no allegation relating to the "advice and assurances" generally alleged in Paragraph XXIV of the second amended complaint.

(b) The evolution of the pleadings, from the verified complaint to the second amended complaint, exposes the intent of plaintiffs to tailor the pleadings so as to avoid the defenses of limitations and laches.[38]

(c) The defendant, by two motions to dismiss, by oral arguments and by motion for summary judgment, repeatedly raised the defenses of limitations and laches. Yet plaintiffs' counsel, though fully apprised of these issues, never once referred to any specific evidence which actually existed and which could be adduced at the trial in support of the general allegations of Paragraph XXIV of the second amended complaint.

The conclusion is inescapable that the allegations in Paragraph XXIV are formal and "insufficient to state a justiciable controversy requiring the submission thereof for trial."[39] We submit that the District Court was manifestly correct when it determined on this record that there was no genuine issue as to any material fact.

D. The Material Facts as to Which There Is No Genuine Issue Entitled Defendant to Judgment as a Matter of Law.

1. THE APPLICABLE LAW WAS THAT OF THE STATE OF WASHINGTON.

The jurisdiction of the District Court was based on diversity of citizenship and the applicable law of limita-

38. See *Kowalewski v. City of Hastings*, supra, fn. 26, at 827 and 828.

39. *Zampos v. United States Smelting Refining and Min. Co.*, supra, fn. 26 at 173, 174.

tions and laches therefore was that of the forum,[40] the State of Washington.

2. THE ACTION IS BARRED BY THE STATUTE OF LIMITATIONS AS APPLIED IN WASHINGTON.

The statutes of Washington prescribe a limitations period of three years in actions "upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument."[41] This three-year period of limitations is expressly applicable to plaintiffs' first cause of action and has been construed unequivocally as applicable to the second cause of action for unjust enrichment.[42]

The District Court held that "the right of action on both causes of action accrued when defendant breached the contract and made it clear by its acts and conduct that its part of the contract would not be performed" (R. 248). This rule was applicable whatever the relationship of the parties under the oral contract.[43] Accordingly, the District Court's decision on the material facts was correct under the applicable law of the State of Washington.

3. THE ACTION IS BARRED BY THE DOCTRINE OF LACHES AS IT HAS BEEN APPLIED IN WASHINGTON.

The District Court properly held that neither of the alleged causes of action was equitable (R. 247, 248). In addi-

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40. For a recent case applying this rule see *Beehler v. Kaye*, 222 F.2d 216 (Cir. 10, 1955).

41. Section 4.16.080 subd. (3), Revised Code of Washington.

42. *Halver v. Welle*, 44 Wn. 2d 288, 266 P.2d 1053 (1954); *Geranios v. Annex Investments*, 45 Wn. 2d 233, 273 P.2d 793 (1954).

43. Even in cases where the relationship of the parties is of a fiduciary nature the statute begins to run as soon as the plaintiff has knowledge of the repudiation. See *Arneman v. Arneman*, 43 Wash. 2d 787, 264 P.2d 256 (1953) at 264 P.2d 262 (resulting trust); *Corliss v. Hartge*, 180 Wash. 685, 42 P.2d 44 (attorney and client).

tion in Washington the statute of limitations is applicable to both legal and equitable rights.[44] The plaintiffs argued, however, that their case was unusual, calling for the application of equitable principles. Therefore the Court considered the doctrine of laches and held that recovery was precluded under that doctrine also.

The holding of the District Court was clearly a correct application to this case of the doctrine of laches as it has been applied in the State of Washington.[45]

E. The Points Raised in Plaintiffs' Specifications of Errors Are Without Merit.

1. THE ALLEGED ERROR IN STRIKING PLAINTIFFS' MOTION FOR ADJOURNMENT OF HEARING ON MOTION FOR SUMMARY JUDGMENT.

Plaintiffs assert there was error in striking from the record their Motion for Adjournment of Hearing on Summary Judgment Motion.

The District Court acted correctly in striking the motion for adjournment because Rule 56 grants to a party moving for summary judgment the right of an inquiry into the merits to determine if there are genuine issues of fact just so that the expense and hardship of trial can be avoided if there are no such issues. If it had done otherwise, the District Court would have erred in not following the plain mandate of Rule 56.

Further, when plaintiffs asserted in support of their motion that the hearing should be postponed because there were genuine issues of fact requiring trial, they were merely presenting the "crucial question before the court on the summary judgment motion; namely, as to each affirmative defense alleged by defendant, [was] there a genuine issue

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44. See *Arneman v. Arneman*, supra, fn. 43 at 264 P.2d 262.

45. *Tecter v. Brown*, 130 Wash. 506, 228 Pac. 291 (1924); *Kilbourne v. Kilbourne*, 156 Wash. 439, 287 Pac. 41 (1930).

of material fact?" (R. 236) If there had been such an issue, the motion for summary judgment would have been denied (R. 236).

2. THE ALLEGED ERROR IN GRANTING THE MOTION FOR SUMMARY JUDGMENT.

This specification of error contains seven separate grounds. In some instances it is not clear from plaintiff's brief exactly what is claimed as error, but an attempt is made to discuss each ground as best as it can be understood.

(1) Plaintiffs contend: The defense of laches and the statute of limitations are affirmative defenses, either of which must be established "after a full hearing on testimony by both parties."

If plaintiffs are stating here that summary judgment cannot be granted on the grounds of limitations and laches, they are stating a proposition that has been rejected by the courts. Summary judgments on the grounds of limitations or laches have been upheld in three cases decided in this circuit alone.[46]

(2) Plaintiffs contend: No date can definitely be determined from the pleadings depositions, admissions on file, or affidavits when plaintiffs can be charged with laches or when the statute of limitations commenced to run.

The fact that "plaintiffs' causes of action must have accrued more than three years prior to July 16, 1952" is the very fact as to which the District Court determined there was no genuine issue. See discussion at pp. 35 to 38 above.

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46. *Suckow Borax Mines Consol. v. Borax Consolidated*, supra fn. 14; *Burnham Chemical Co. v. Borax Consolidated*, 170 F.2d 569 (Cir. 9, 1948); *Latta v. Western Inv. Co.*, 173 F.2d 99 (Cir. 9, 1949). See also *Gifford v. Travelers Protective Ass'n.*, supra fn. 31, upholding a summary judgment granted on the ground that an action had not been brought on an insurance contract within the six-month period specified in the agreement.

(3) Plaintiffs contend: The parties entered into a "Joint Venture Agreement" and "without a full hearing on testimony by both parties it cannot be determined as a matter of law that each party to such agreement fulfilled such obligations."

There is nothing in this asserted ground that is inconsistent with the District Court's ruling.

For the purposes of the motion it was admitted that the alleged oral contract had been made and had been performed by plaintiffs. In addition, from plaintiffs' pleadings and from the uncontroverted affidavits of defendant, it was undisputed that defendant had breached and abandoned such alleged oral contract, to the plaintiffs' knowledge, more than three years before the commencement of this action. See discussion at pp. 35 to 38 above.

(4) Plaintiffs contend: "The relationship of the parties, being based on a bilateral contract, can be rescinded, abrogated, abandoned or terminated only by mutual consent or the accomplishment of the objects of the joint venture agreement, and if otherwise terminated each party must put the other in *status quo*."

Again there is nothing asserted which is inconsistent with the ruling of the District Court. Plaintiffs simply omit to mention that their causes of action arose more than three years before the commencement of the action and are barred by limitations and laches.

(5) Plaintiffs contend: "There is nothing in the record presented to the trial court from which it can be determined, either as a matter of law or as a fact, that the appellee has suffered any disadvantage or detriment by the delay" in commencing the action.

This ground relates to the alternate holding that the action is barred by laches. The District Court held that plain-

tiffs' causes of action were barred by limitations. It considered the defense of laches on the insistence of plaintiffs that their case was an unusual one, requiring the application of equitable principles. The District Court, in holding that the causes of action also would be barred by laches, was correct for the reason that it stated so succinctly:

> "It is difficult to imagine a litigant being put to more serious disadvantage than to be called upon to defend against an eight and one-half million dollar law suit based upon a 39-year-old oral contract, when the only witnesses who could possibly testify in behalf of the defendant as to whether or not the contract was actually made, and, if so, as to what were its terms and conditions, have been dead for eight years or more." (R. 252)

(6) Plaintiffs contend: The affidavits submitted by the defendant purporting to support its motion for summary judgment do not conform with Rule 56(e) requiring personal knowledge.

In the affidavits submitted in support of the motion, the affiants state by direct allegations the facts contained therein and support them in the case of the affidavits dealing with the records of the Federal Power Commission and the Secretary of State of the State of Washington, with documents in proper form to be admissible in evidence.

(7) Plaintiffs contend: It appears from the complaint, and is not denied by defendant, that the defendant at all times prior to the commencement of this action led the plaintiffs to believe its purpose and intention was to perform its part of the joint venture agreement, and there was therefore a genuine issue of material fact presented by the record.

This is exactly the issue raised by the motion for summary judgment. Defendant established, and the District

Court determined, that defendant had breached the alleged agreement and made clear to plaintiffs by its acts and conduct that its part of the alleged agreement would not be performed more than three years before the commencement of the action. The plaintiffs never met the issue thus raised. The District Court's determination that there was no genuine issue of material fact is manifestly correct on the record. See discussion at pp. 39 to 42 above.

IV.

CONCLUSION

This case is a clear example of the wisdom of providing for summary judgments in the Federal Rules. This Court knows that summary judgment would not have been granted by the District Court if there had been any basis in the record for concluding that plaintiffs could adduce evidence which would "change the result" of the uncontroverted evidence presented by defendant in support of the motion for summary judgment. It is this fact that plaintiffs seek to avoid—for the reason that there is no such evidence. The judgment should be affirmed.

Respectfully submitted,

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No. 15395

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

MILTON E. DAM AND EVERETT S. DAM,
Co-partners doing business under
the Firm Name and Style of
DAM BROTHERS, *Appellants,*

vs.

GENERAL ELECTRIC COMPANY,
a corporation, *Appellee.*

Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division

BRIEF OF APPELLANTS

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SUBJECT INDEX

TABLE OF CASES (Continued)

TEXTS

STATUTES

No. 15395

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BRIEF OF APPELLANTS

JURISDICTIONAL STATEMENT

(NOTE: The bracket reference numbers [ ] refer to the printed Transcript of Record.)

The jurisdiction of the District Court of the United States for the District of Washington, Northern division, was invoked pursuant to the provisions of Title 28, United States Code, Section 1332, the appellants being partners and residing in the state of Washington and the appellee being a corporation organized and existing under the laws of the state of New York. [96-97]. The amount in controversy exceeds the sum of $3,000.00, exclusive of interest and costs.

The jurisdiction of this court to review this case arises under Title 28, United States Code, Sections 1291 and 1294, this being an appeal from a final decision of a District Court from which an appeal may be taken.

In addition, the appellee by its motion for summary judgment invoked the jurisdiction of the District Court, and the District Court assumed jurisdiction and entered summary judgment on such motion.

STATEMENT OF THE CASE

There is a historical background to this case outlined in the Second Amended Complaint (which for brevity will hereafter be referred to as the "complaint" as distinguished from the "Original Complaint" and the "First Amended Complaint" which will be referred to as "Original" and "First Amended" complaints,) which background should be considered in connection with the isues on this appeal.

The general locale of the action is the Columbia river, the headwaters of which are in Montana and flows northerly into Canada and makes a horse-shoe loop and enters the state of Washington near the northeast corner of that state and flows westerly and southerly through Washington to its junction with the Snake river and thence westerly to the Pacific ocean; the particular locale is the general area where the Columbia is adjacent to the westerly end of the Saddle mountains called the Priest Rapids of the Columbia, easterly from the Columbia and southerly from the Saddle mountains, generally called the Wahluke Slope, and the irrigable lands in that territory.

Appellants are brothers whose parents settled on lands adjacent to Priest Rapids and were born and raised in that vicinity and knew the country and its potentialities, particularly along agricultural lines,

if irrigated, and had worked out a system for irrigating lands of the Wahluke Slope, diverting water from the Columbia at Priest Rapids and carrying it through ditches eastward and southward to and upon the Wahluke Slope. This system contemplated a wing dam to divert the water but did not require bridging the Columbia from bank to bank. Appellants had advanced the project to where they controlled some one hundred fifty thousand acres of irrigable lands in 1910 and before. Appellants were principally interested in an agricultural irrigation development.

Appellee's interest was in developing electrical energy and the Columbia, at Priest Rapids, was suited for such purpose, but an electric power project required damming the river from bank to bank and controlling the flow of the water through turbines to generate electricity, before diverting the same to the lands for irrigation purposes.

Combining their interests for the development of electrical power and the use of water for irrigation purposes, the parties worked out plans for the development of Priest Rapids for both power and irrigation and in the year 1913 entered into the joint venture agreement outlined in paragraphs XV to XV1½ [108-113] of the complaint, both sides to per-

form duties and obligations and reap benefits, all as set out in the complaint, but in the accomplishment of which certain Congressional legislation was required, for the passage of which the voting support of the landowners controlled by the appellants was required.

Appellants entered upon the joint venture agreement and through their influence and efforts promoted the required legislation and gave their active lives in making the project possible and fully performed on their part the joint venture agreement. The legislation accomplished vast potentialities to the appellee, not alone in connection with the Priest Rapids project but in the development of electrical energy on navagable and other streams all over the United States. The appellee entered upon a vast development of electrical power projects all over the country, some two hundred thirty-five in number, and capitalized upon and benefited through the work and efforts of the appellants and became the world's leader in producing electrical energy and in manufacturing electrical appliances, but at all times demonstrating to appellants that the Priest Rapids project was to be developed as originally planned and the appellants would reap the benefits promised under the joint venture agreement.

It is the appellants' position that through the actions of the appellee and the subsidiary corporations controlled by it, an enormous hoax or fraud was perpetrated and the appellants and their interest were by-passed. They had no knowledge nor intimation of what was occuring and nothing upon which to base a belief that the appellee was not acting in the utmost good faith required of a joint venturer with and toward the other, until immediately prior to instituting this action.

Upon the institution of this action the appellee exhibited an "about-face" attitude and has employed every tactic and device to defeat appellants' claims or in any way to compensate appellants for devoting their active lives to the cumulation of the joint venture agreement, but on its part the appellee has reaped and retained all of the benefits and riches resulting to it as the benefits conferred upon it through the appellants' performance of the joint venture agreement.

Appellants' position is that they have been treated unjustly an inequitably, and are asking that the appellant be compelled to do what is right and equitable so far as these appellants are concerned.

Although this action was instituted in July, 1952, [3-44] it was not until August, 1956, that summary judgment [255] was entered against appellants, through no fault of appellants. If laches existed as found by the court, it existed four years before the finding of laches.

In its opinion rendered in connection with the motion for summary judgment, the trial court said: [247]

> "Moreover, one of the principal objects of the contract was the construction of a dam across the Columbia River at the Priest Rapids site for the generation of electrical energy, and *the court will take judicial notice* that a permit for the building of such a dam at the same site has been issued by the Federal Power Commission to the Grant County Public Utility District, and at least preliminary work on the project has been commenced."

For the conveyance or surrender to the Grant County Public Utility District of water and other rights along both banks of the Columbia at said site for approximately twenty-five miles, acquired by the appellee and its subsidiary corporations for it, through and as the results of the efforts and performance of the joint venture agreement, there has been allocated to the appellee and its subsidiaries and municipal corporations the following percentages of the electrical energy to be produced by such project, to-wit:

Agency	*Percentages*	*Kilowatts*
Pacific Power & Light Co.	13.9	87,570
Portland General Electric Co.	13.9	87,570
Puget Sound Power & Light Co.	8.0	50,400
Seattle City Light	8.0	50,400
Tacoma City Light	8.0	50,400
Washington Water Power Co.	6.1	38,430
Cowlitz County PUD	2.0	12,600
City of Eugene, Oregon	1.7	10,710
City of Forest Grove, Oregon	0.5	3,150
City of McMinnville, Oregon	0.5	3,150
City of Milton-Freewater, Oregon	0.5	3,150
Kittitas County PUD	0.4	2,520
Grant County PUD	36.5	229,950

In other words, while there has been allocated to the Grant County PUD 36.5% of the electrical power to be produced, the appellee and its subsidiaries has been allocated 41.9%, without recognizing any rights of the appellees under the joint venture agreement or compensating them.

SPECIFICATION OF ERRORS

I

The court erred in summarily, and of its own motion without any hearing, denying appellants' Motion for Adjournment of Hearing on Summary Judgment Motion [221-2], and in entering its Order Striking Motion for Adjournment of Hearing on Summary Judgment Motion [234].

II

The court erred in granting appellee's Motion for Summary Judgment [255] in favor of the appellee, on each and all of the following grounds:

First. Under RULE 8(c) the defenses of laches and of the statute of limitations are affirmative defenses, either of which must be established after a full hearing on testimony by both parties, and the appellee has the burden of establishing either defense by a preponderance of the evidence;

Second. No date can be definitely determined from the pleadings, depositions, admissions on file, or affidavits, when the appellants can be charged with laches, or when the statute of limitations commenced to run;

Third. Under the allegations of the complaint (XV-XVII) [108-114], the parties entered into a joint

venture agreement, which allegations, for the purpose of the motion, are to be taken as true, and the rights of the parties determined under rules relating to joint adventurers. A fundamental principle underlying such relationship is that each party owes to the other the utmost good faith in all their dealings relating to such joint venture, and without a full hearing on testimony by both parties, it cannot be determined *as a matter of law,* that each party to such agreement fulfilled such obligations.

Fourth. The relationship of the parties, being based on a bilateral contract, can be rescinded, abrogated, abandoned or terminated *only* by mutual consent or the accomplishment of the objects of the joint venture agreement, and if otherwise terminated each party must put the other in *status quo,* and it appearing from the complaint that appellants on their part have fully performed, and have not been compensated, it is unjust and inequitable for the court to render summary judgment for the appellee without giving to appellants their day in court or an opportunity to establish their rights;

Fifth. At least two elements must exist before the doctrine of laches comes into operation, to-wit, (a) unreasonable delay in asserting rights, and (b) such delay has worked to the detriment or disadvantage of the other, so that it would be unjust or inequitable

to enforce such rights, and there is nothing in the record presented to the trial court from which it can be determined, either as a matter of law or as a fact, that the appellee has suffered any disadvantage or detriment by the delay. The burden of proof to establish the elements of laches is on the appellee and the appellee has not sustained such burden;

Sixth. The affidavits submitted by the appellee, purporting to support its motion for summary judgment, do not conform with RULE 56(e), requiring personal knowledge;

Seventh. It appears from the complaint, and is not denied by the appellee, that the appellee at all times prior to the commencement of this action lead the appellants to believe that its purpose and intention was to perform its part of the joint venture agreement, and intention was to perform its part of the joint venture agreement, and appellee deceived and concealed from the appellants its purpose and intention not to perform its part of such joint venture agreement, and circumstances exist in this case which excuse the appellants' delay, and render it unjust and inequitable to interpose the bar of laches or statute of limitations, and the appellee is estopped to rely on such defense, and the facts and circumstances excusing such delay cannot be determined as a matter of law, without evidence, or based on speculation or

conjecture, and there was a genuine issue of material fact presented by the record in this case, which precludes the trial court from entering a valid summary judgment.

ARGUMENT

Specification of Error No. I

Simultaneously with the service of its answer [204] the appellee served its Motion for Summary Judgment [220]. Upon service of such motion the appellants served and filed their Motion for Adjournment of Hearing on Summary Judgment Motion [221] based upon the records and files including the affidavit of Harve H. Phipps, Sr. [222].

Forthwith the trial judge, of its own motion and without any hearing, entered its Order Striking Motion for Adjournment on Summary Judgment Motion [234], and entered its Order Granting Motion for Summary Judgment [254], without any hearing, and rendered its Summary Judgment [255] in favor of the appellee. In his letter of August 8th, 1956, [236] the trial judge attempted to justify his action with reference to entering the order striking appellants motion for adjournment with the statement that "there is not provision in the rules for such a motion."

RULE 1 provides that "They (Federal Rules of Civil Procedure) shall be *construed* to secure the *just, speedy* and *inexpensive* determination of every action.

RULE 56(c) provides, with reference to motions for summary judgment that "the judgment sought

shall be rendered forthwith *if* the pleadings, depositions and admissions on file, together with the affidavits, if any, *show that there is no genuine issue as to any material fact* and that the moving party is entitled to judgment *as a matter of law*".

The affidavit of Harve H. Phipps, Sr., [222] specifies at least 29 instances where the answer of the appellee presents genuine issues of material facts, but, notwithstanding, the trial judge summarily ordered the motion stricken and refused to delay the motion for summary judgment until proof could be submitted on such issuable facts. Appellants contend that such action on the part of the trial court was prejudicial error.

In *National Surety Co. v. Rollins,* 16 F.R.D. 530 (syl. 1-2) the court said:

> "On motion for summary judgment, the court is precluded from making any determination of the factual issues. If, in reading of the pleadings, depositions, and affidavits, which comprise the paper record a genuine issue of fact is encountered, the court need go no further; *indeed it is prevented from proceeding further.* Mere existence of a material fact is both the sought-after feature and the limiting element of a court's disposition of the motion".

In *Aetna Insurance Co., v. Cooper Wells Co.,* 234 F. 2d. 342, it is held that the function of a motion for summary judgment is not to permit the court to

decide issues of fact but solely to determine whether there are issues of fact to be tried.

In *Brinich v. Reading Co.,* 9 F.R.D. 420, it is held that where the defendant in its answer pleaded affirmative defenses, no reply by plaintiff is mandatory and facts alleged in new matter must be taken as denied, thereby presenting material issues of fact, precluding summary judgment.

On motion for summary judgment allegations of the complaint would be taken as true. *Engel v. U.S.,* 138 F. Supp. 626; *Schwob v. International Water Corpn.* 136 F. Supp. 310; *Robinson v. U.S.,* 133 F. Supp. 9; *Coy v. Hobby,* 129 F. Supp. 640; *Jeffrey v. Whitworth College* (D.C. Wash.) 128 F. Supp. 219; *Smart v. U.S.,* 111 F. Supp. 907.

Specification of Error No. II

First. RULE 8(c) requires that the defense of either laches or the statute of limitaion be pleaded as an affirmative defense, and under all rules of proceedure a party asserting an affirmative defense has the burden of establishing such defense by a preponderance of substantial evidence, and the same cannot be determined by resort to speculation or conjecture.

Prejudice must exist to establish the defense of laches, it cannot be presumed, and defense of laches or estoppel are affirmative defenses which call for a

full hearing of testimony on both sides. *Jas. McWilliams Blue Lines, Inc. v. Esso Standard Oil Co.,* 145 F. Supp. 392; *Baker v. Nason,* 236 F. 2d. 483; *Potash Co. of America v. International Minerals & Chemical Co.,* 213 F. 2d. 153.

On motion for summary judgment, it is not the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried. *Pickle v. Trimmel,* 93 F. Supp. 823; *Kasper v. Baron,* 191 F. 2d. 737.

Second. It is fundamental that before the statute of limitations commences to run, or a party can be charged with laches for delay in instituting an action, the claim must have "matured", that is, the cause of action must have been ready for suit. The relationship of the parties and their association extended over a long period of time before this action was instituted, but there cannot be read into such relationship or association any definite date or time when either party to the joint venture agreement, particularly the appellee, performed any act or took any action, up to the time immediately prior to the institution of this action, it was brought to the attention of appellants that the appellee was taking steps inconsistent with the purposes of the joint venture agreement, and this action was instituted within a reasonable time thereafter.

Paragraphs XXI to XXIII, inclusive of the complaint [116-118] sets forth facts to excuse appellants' delay in bringing this action, which paragraphs are denied in appellee's answer [209] thereby creating an issue of material fact which would preclude the granting of a summary judgment, but further than this the issue is presented that through fraud, deception, concealment, misrepresentation, the appellee at all times prior to the commencement of this action induced the appellants into a false sense of security and to believe that it was the purpose and intention of the appellee to perform its obligations under the joint venture agreement.

It is held in *Central Ry. Signal Co. v. Longden,* 194 F. 2d. 310, that there must be knowledge before there can be laches and there can be no laches where delay is caused or induced by fraud or concealment, and that a party is not guilty of acquiescence if he is without knowledge of fraud, or where the existence of fraud is concealed from him. There is another principle applicable to the situation in this case and that is that where one party has been misled by the acts and actions of another which have lulled him into a false sense of security, the party so misleading or creating such condition is estopped to assert delay caused thereby as a defense.

In *Hichino Uyeno v. Atchenson,* (D.C. Wash.) 96 F. Supp. 510, it is held to be a fundamental rule of

equity jurisprudence that he who prevents the exercise of rights by another, cannot insist that that right was lost during the period in which its exercise was prevented by him.

In this connection see *Holmberg v. Armbrecht,* 327 U.S. 392, 90 L. ed. 743, 66 S. Ct. 582, 162 A.L.R. 719; *Potash Co. of America v. International Min. & Chem. Corpn.* 213 F. 2d. 153; *Dexter & Carpenter v. Houston,* 20 F. (2d) 647.

Third. Appellants' rights are based on a joint venture agreement under which appellants have fully performed all of their obligations, while this action was instituted as an action to enforce specific performance on the part of the appellee, or, if performance prove impossible to equitably compensate the appellants for the benefits conferred as the result of appellants' performance of the joint venture agreement.

The duties and obligations of joint adventurers to each other are expressed in the Washington case of *Donaldson v. Greenwood,* 242 P(2d) 1038, citing with approval and quoting from *Meinhard v. Salmon,* 164 N.E. 545, as follows:

> "Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at

> arm's length are forbidden by those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor most sensitive, is the standard of behavior. As to this there has been developed a tradition that is unbending and inveterate".

To the same effect see 48 C.J.S. 824-27 (Joint Adventurers, Sec. 5(b), and *Eagle Picher Co. v. Mid-Continent Lead & Zinc Co.* 209 F. 2d. 917; *Taylor v. Brindley,* 164 F. 2d. 235; *Plews v. Burrage,* 19 F(2d) 412; *Hey v. Duncan,* 13 F. 2d. 794.

Under the allegations of the complaint, which for the purpose of this motion must be accepted as true, no other conclusion can be reached than that from the full performance of the joint venture agreement by appellants, the appellee has reaped, whether justly or unjustly, untold benefits, and whether under the theory of implied agreement to compensate the appellants for such benefits, or under the theory of unjust enrichment, the trial court erred in granting summary judgment thereby depriving appellants of their day in court and their right to equitable relief, and summarily "booting" them out of court on a motion for summary judgment.

By its action the trial court has violated not only the letter but the spirit of RULE 1 that "They (the rules) shall be construed to secure the *just, speedy*

and *inexpensive* determination of every action". None of these elements have been accomplished by the action of the trial court. *Justice* has been raped, the trial of the action has been delayed, and the appellants have been delayed for an inestimable time in coming to this court to obtain their day in court, and have been put to an enormous expense. Every purpose contemplated by RULE 1 has been sacrificed.

Fourth. This action being based on a bilateral contract for a joint adventure, with obligations to be performed and benefits to accure to each party, and the appellants having performed all of the obligations on their part to be performed from which performance on the part of appellants the appellee has reaped its benefits but the appellee has failed to perform its obligations so as to permit the appellants to enjoy the benefits anticipated by them ,the objects of the joint venture agreement not having been attained and there being no *mutual* rescission or abandonment of the joint venture, justice and equity requires that appellee be required to perform its obligations under the contract, or if such performance cannot be had, adequate compensation be compelled from it to appellants in lieu of such performance, and the determination of the terms and conditions of a just, proper and equitable decree to be issued under the facts in this case must be based on substantial evidence after a full hearing.

The appellee, after receiving the benefits of the joint venture agreement, cannot rescind or abandon the agreement, without placing the appellants *in status quo,* or as nearly as possible to do so, or compensating the appellants for the advantages, benefits and riches acquired by it, as the result of the performance on the part of appellants.

As stated in *Rubenstein v. Dr. Pepper Co.,* 228 F. 2d. 528:

> "A party may not have rescission of a contract where he affirms and retains benefits of a contract and seeks only *to disaffirm its obligations*".

and in the case of *May v. Rice,* 118 F. Supp. 331, it is held that rescission means not only the annulment or abrogation of a contract, but the placing of the parties *in status quo,* and implies restoration to the same situation and the same terms as existed when the contract was made, and requires surrender of any consideration or advantage secured by either party, or an offer to restore.

The nature of this action being equitable and the court having jurisdiction, the trial court should have retained jurisdiction of the action until a fair, just and equitable decree was entered, after a full hearing, and not summarily enter judgment denying equitable relief, and if the fair, just and equitable dis-

position of the case requires a money judgment to compensate appellants for the unjust enrichment and benefits received by the appellee, then such form of money judgment should be rendered and entered.

Fifth. Before it can be determined, *as a matter of fact,* that appellants' claims are barred, it must be established as a fact, beyond the realm of speculation or conjecture that appellants delayed bringing this action an unreasonable length of time after the claims "matured" or were ready for suit, and that by reason of such delay the other party, appellee, has suffered detriment or been damaged, so that it would be unjust or inequitable to enforce such claims.

A reading of the complaint [122] clearly establishes that instead of being damaged or suffering detriment by the delay, the appellee has been benefitted and enriched, and is reaping benefits, and will continue to do so, as evidenced by the statement of the case at the beginning of this brief where it is demonstrated that the appellee and its subsidiary corporations has a 41.9% allotment of the power to be developed by the Grant County Public Utility District.

In re National Moulding Co. 230 F. 2d. 69;
Baker v. Nason, 236 F. 2d. 483 (supra).

Sixth. RULE 56(e) requires affidavits submitted in support of a motion for summary judgment be made

on *personal knowledge*. It is submitted that none of the affidavits submitted are made on personal knowledge nor do they submit any facts from which it can be determined that the appellee has suffered any detriment or damage directly attributable to the delay in bringing the action, nor do they set up any material facts to support appellee's motion for summary judgment.

A mere reading of the record in this case clearly shows that the trial court's decision was not based upon anything other than guess, speculation or conjecture and the summary judgment entered in this case was improperly and improvidently entered.

Seventh. Under the issues raised by the complaint and the answer of the appellee, the appellants are entitled to submit evidence that at all times immediately prior to the commencement of this action the appellee lead appellants to believe that it was its purpose and intention to develop both the electrical power potentialities and the irrigation possibilities to be obtained through the development of the Priest Rapids project, and it was not until the appellee and the subsidiaries controlled by and operating under it commenced selling off the irrigable lands, retaining however the water rights and power sites, did appellants discover that appellee's purposes and intentions might be otherwise. The entire project contemplated both the development of the irrigable agri-

cultural lands, which was the original purpose of appellants, and the development of the water power potentialities to generate electrical power, which was the original interest of the appellee, but under the circumstances one was dependent on the other, as alleged in the complaint.

The RULE authorizing summary judgment by its terms limits its application to cases where there is no genuine issue as to material facts, and its application leaves to discretion in the trial court, that is to say, if there is an issue the rule does not apply and the issue must be decided on evidence.

Summary judgment proceedure is not intended to be a substitute for trial of cases where there are genuine issues of disputed facts on which the outcome of the litigation depends. *Griffeth v. Utah Power & Light Co.,* (C.A. Idaho) 226 F. 2d. 661. The purpose of the rule was not to require a party to try his case on affidavits, with no opportunity to cross-examine witnesses. *Dulansky v. Iowa-Illinois Gas & Electric Co.,* 191 F. 2d. 881.

Summary judgment should be invoked with caution to the end that litigants may be afforded a trial where a bona fide dispute of material facts exists between them. *Panaview Door & Window Co. v. Van Ness,* (D.C. Cal.) 135 F. Supp. 253. A motion for sum-

mary judgment should be considered with great care by trial juduge. *Long v. Arkansas Foundary Co.*, 137 F. Supp. 835.

CONCLUSION

There are genuine issues of material facts to be tried on evidence in this case, including the determination of the fact as to when the action matured or was ripe for suit and whether there was an unreasonable delay in bringing the action thereafter, and whether or not the appellee suffered damage, detriment or was prejudiced by reason of such delay so that it is unjust and inequitable to enforce the appellants demands at this time, and because of such issues, which can only be determined by evidence, RULE 56, permitting the entry of summary judgment, has no application to the record in this case, and the trial court erred both in striking appellants' motion to adjourn the hearing on the motion for summary judgment until such evidence could be presented, and in rendering and entering such summary judgment in the face of genuine issues of material facts, and that such summary judgment should be set aside and this case remanded for trial on the issues presented by the pleadings.

Respectfully submitted,

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